(9)

No. 90-634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAN COHEN,
PETITIONER

v.

COWLES MEDIA COMPANY,
d/b/a Minneapolis Star and Tribune Company, and
NORTHWEST PUBLICATIONS, INC.,
RESPONDENTS

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF FOR RESPONDENT NORTHWEST PUBLICATIONS, INC.

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QUESTIONS PRESENTED

The Minnesota Supreme Court, after holding under state law that petitioner had failed to prove a cause of action for either breach of contract or fraud, concluded that a reporter's promise of confidentiality to petitioner was not enforceable under Minnesota promissory estoppel law. In determining under state law "whether it would be unjust not to enforce the promise," the court considered "all the reasons why it was broken" and "weigh[ed] the same considerations that are weighed [in determining] whether the First Amendment has been violated." Pet. App. A11, A13. The questions presented are as follows:

1. Whether the Minnesota Supreme Court's weighing of the same policies that underlie the First Amendment, as part of its balancing of public policy factors under the state-law doctrine of promissory estoppel, presents a federal question reviewable by this Court.

2. If so, whether the Minnesota Supreme Court properly gave weight to First Amendment considerations where petitioner was a public figure whose identity as the source of the story was itself highly newsworthy and the story conveyed truthful political information about a forthcoming gubernatorial election.

RULE 29.1 STATEMENT

The parent company of respondent Northwest Publications, Inc., is Knight-Ridder, Inc. Northwest Publications, Inc., the publisher of the St. Paul Pioneer Press Dispatch (now named the St. Paul Pioneer Press), has no subsidiaries that are not wholly owned.

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BRIEF FOR RESPONDENT NORTHWEST PUBLICATIONS, INC.

STATEMENT

At issue in this case is a conflict between two fundamental tenets of journalism: a newspaper's obligation to publish full and accurate information on political issues of importance to the voting public, and its responsibility to honor a reporter's promise of confidentiality to a source. The Minnesota Supreme Court held, as a matter of state law, that the defendant newspapers' decisions to override their reporters' promises of confidentiality to petitioner

did not give rise to a cause of action for breach of contract or fraud. In addition, viewing this case as "fraught with moral ambiguity" (Pet. App. A11), the court concluded that state-law principles of promissory estoppel did not confer upon petitioner a legal right of confidentiality that would preclude the newspapers from publishing truthful and significant political information.

A. The 1982 Minnesota Gubernatorial Election

This case arises out of the 1982 gubernatorial election in Minnesota. The candidates for the ultimately prevailing Democratic-Farmer-Labor ("DFL") party were Rudy Perpich for governor and Marlene Johnson for lieutenant governor. Wheelock Whitney and Loris Krenik were the candidates for governor and lieutenant governor for the Independent-Republican ("I-R") party.

Shortly before the November 2 election, voter polls revealed that the I-R ticket was trailing the DFL ticket by approximately 18 points. Tr. 747. Soon after the polls came out, Loris Krenik appeared on a radio program devoted to the race for lieutenant governor. During the program, the host made reference to the political consequences of "an old criminal offense" committed by one of the candidates, and Krenik decided that an investigation should be made into the background of his opponent, Marlene Johnson. Tr. 142-143.

As a result, Gary Flakne, a former I-R state legislator and Hennepin County Attorney, sought to ascertain whether Johnson had a criminal record. Tr. 141, 581-584, 607. Flakne obtained two public court records concerning Johnson. Tr. 554-559, 584-585. The first record showed that Johnson had been charged with three misdemeanor counts of unlawful assembly in 1969 and that the case had been dismissed in 1970. Pl. Ex. 15. Although not disclosed in

the record Flakne obtained, these charges grew out of a protest against the failure of the City of St. Paul to hire minority workers on public construction projects. Pet. App. A4 n.2.

The second court record reflected a 1970 charge against Johnson for petty theft. Johnson's conviction was set aside eight months later after she had received medical treatment. Pl. Ex. 16. Although again not stated in the court record, this charge related to Johnson's failure to pay for $6 in sewing materials at a time when she was upset and disoriented by her father's recent death. Pet. App. A4 n.2.

On the morning of October 27—just six days before the election—a meeting was convened at Whitney Campaign headquarters. In attendance were petitioner Dan Cohen and Gary Flakne; Arnold Ismach, a professor of journalism at the University of Minnesota and media consultant to the Whitney Campaign; George Thiss, a former I-R chair; and Jerry Olson, a former state legislator. Tr. 141.

At the time of this meeting, petitioner was performing various services for the Whitney Campaign in his capacity as Director of Public Relations at Martin-Williams Advertising. Tr. 138, 1520-1521. Petitioner testified that he was working for the Whitney Campaign during the events that led to this lawsuit and that he planned to charge the Campaign for time spent on the Johnson attack. Tr. 266. In fact, petitioner had long been active in Republican politics, having served on the Minneapolis City Council in 1965-1969 and been its President for the last two years, and having run for mayor of Minneapolis in 1969, sought to regain a City Council seat in 1973, and campaigned for the Republican nomination for Hennepin County Commissioner in 1982. Tr. 275-282.

Petitioner also had extensive experience with the media. He had been a public relations official with the Peace

Corps and was responsible for public relations at Martin-Williams Advertising. Tr. 281, 297-300. Throughout his political and business career, petitioner had dealt with the media on a regular basis (Tr. 277-278, 290-291, 372-373) and often provided information to the press. Tr. 372-373, 486-487, 495. Petitioner also had been a freelance columnist in Minnesota and a contributor of editorial articles for the Minneapolis Star and Tribune ("Star Tribune"). Tr. 125, 289-292.

At the October 27 meeting, Johnson's court records were discussed. As petitioner explained at trial, "a consensus was reached" that they should be disclosed to the public and he "volunteered" to distribute them to the media. Tr. 147, 149. Petitioner and Ismach decided that the records should be provided to the Star Tribune, the St. Paul Pioneer Press Dispatch ("Pioneer Press Dispatch"), the Associated Press ("AP"), and WCCO-TV (the local CBS affiliate).

Petitioner and Ismach decided that Johnson's court records should be leaked to the media without identifying the source of the documents because such information "could damage the [Whitney] campaign." Tr. 150; see also Tr. 378. At the same time, using petitioner to furnish the documents, rather than anonymously providing them in a "plain brown envelope," enhanced their credibility and increased the chances that the media would publicize Johnson's criminal record. Tr. 597-599, 725-728. Accordingly, petitioner and Ismach agreed that petitioner would contact reporters at the four media companies and offer them the Johnson materials on condition of confidentiality. Tr. 150-151, 154, 756.

No one at the October 27 meeting was asked to keep secret the plan for petitioner to leak the documents to the media. Tr. 358, 756. In fact, Ismach called the Whitney Campaign to "let[ ] them know what was happening so that they wouldn't be surprised by it" (Tr. 737, 739) and informed them that petitioner intended to release the Johnson records to the press. Tr. 756.

B. Petitioner's Contacts With The Reporters And Publication Of The Articles

Immediately after the October 27 meeting, petitioner placed calls from Whitney Campaign headquarters to reporters for each of the selected media organizations. He told them that he had information that "may or may not relate to the upcoming statewide campaign" and that he would provide this material if "we can reach an agreement as to the basis on which I give [it to] you." Tr. 151.

Later that day, petitioner met separately with each of the four reporters: Bill Salisbury of the Pioneer Press Dispatch, Lori Sturdevant of the Star Tribune, Gerald Nelson of the AP, and David Nimmer of WCCO-TV. Petitioner stated that he would provide certain material to each reporter if the reporter promised to maintain petitioner's anonymity and not to question him about his source. Pet. App. A3.

Each reporter, without being told anything further and before seeing the documents, agreed to petitioner's terms. Tr. 155-157, 165, 172-173, 176. Salisbury was not informed that the material had been given to other reporters (Tr. 416-417); Sturdevant, however, after promising anonymity, asked whether she had the documents on an exclusive basis and was told that she did not. Tr. 158-159, 450; Pet. App. A23. Although the reporters generally knew that petitioner was active in I-R politics and involved in the Whitney Campaign, at no time did petitioner mention that fact or indicate that he was acting in his capacity as a Whitney Campaign adviser. Tr. 368-370.

The four media companies reached different editorial judgments on the best way to handle the story of Johnson's criminal record and petitioner's clandestine disclosure of that material. As explained below, the Star Tribune and the Pioneer Press Dispatch independently decided on October 27 to publish both the fact of Johnson's record and petitioner's role as the source of that information, and their stories ran the next day. This was the first and only time that either of these newspapers had breached a promise of confidentiality. Pet. App. A24, A25. The AP wrote an article regarding Johnson's record but not disclosing petitioner's identity, stating only that court documents "were slipped to reporters." J.A. 11; Tr. 395. And WCCO-TV gave no coverage at all, based upon Nimmer's recommendation that it was not "fair to the [Perpich-Johnson] campaign." Tr. 491, 504.

1. **The Editorial Decision Of The Star Tribune.** The deliberations at the Star Tribune vividly illustrate the dilemma that confronted the press in this case. After being informed by Sturdevant of Johnson's criminal record and the promise of confidentiality to petitioner, editors at the Star Tribune sent another reporter, David Anderson, to check the original file. Anderson located the records, which showed that Gary Flakne had signed them out the previous day and that no one else had examined them for many years. Tr. 1572-1574, 1599-1600. Anderson was familiar with Flakne's name and knew that he was active in Republican politics. Tr. 1573. Anderson immediately telephoned Flakne, who admitted that he had signed out Johnson's court records and that he " 'did it for Dan Cohen.' " Tr. 1601.[1]

[1] Both the Minnesota Supreme Court (Pet. App. A4) and the Minnesota Court of Appeals (*id.* at A24) specifically determined that Flakne told Anderson that he had obtained the records for petitioner. Although petitioner, in his brief in the Minnesota Supreme Court (at 6-7), disputed Flakne's conversation with Anderson, this Court should accept that fact in light of the concurrent determinations of two courts below (see, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 351 (1987); *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952)), which are fully supported by the record. Tr. 325-326, 356, 1640.

(Footnote continued on following page)

Anderson's investigation left no doubt that Flakne had obtained the records for petitioner and that it was part of an eleventh-hour plan to discredit the DFL ticket. Tr. 1603-1604. At the same time, however, both Wheelock Whitney himself and Jann Olsten, the Whitney Campaign manager (who had learned of petitioner's role from Ismach (see pages 4-5, *supra*)), attempted to distance the Campaign from petitioner's activities, stating that petitioner had acted without the knowledge or permission of Whitney or his staff. J.A. 2. As Olsten added: "I don't know how Cohen got the information about Johnson—he must have looked it up in the records." *Ibid.*

The Star Tribune had not yet decided whether or what kind of article to publish, and the matter was vigorously discussed at the editors' daily news huddle. Various options were considered: to publish no article at all because the story of Johnson's 12-year-old misdemeanor record was not newsworthy; to run an article reporting Johnson's record and also disclosing petitioner's identity as the source of the documents, since the fact that the information came from a Whitney ally was itself highly newsworthy; to protect the confidential source at all costs regardless of considerations of newsworthiness; and to reveal the connection between the Whitney Campaign and the information by using a veiled reference that would not identify petitioner's name (such as "a Whitney Campaign adviser" or "a Whitney supporter").

Later that evening, approximately one hour before press time, Assistant Managing Editor Mike Finney and Manag-

ing Editor Frank Wright made the final decision to publish the story of Johnson's criminal record and to disclose petitioner as the source. Tr. 450-451, 1142-1143, 1148, 1232, 1234, 1302. They rejected the alternatives to full and candid disclosure as inadequate in this situation. The option of not printing any story at all was regarded as unsatisfactory for three reasons: Johnson's criminal record was in fact newsworthy; several other news organizations had the information, and therefore the information was likely to come out anyway and should be available to Star Tribune readers; and, if it did not publish the story, the Star Tribune would be exposed to charges of a cover-up to protect the Perpich Campaign, which the newspaper had endorsed a few days earlier. Tr. 1310-1311, 1475-1476, 1639.

The Star Tribune also decided against disclosing Johnson's criminal record without revealing its source. In the present context, the identity of the source was considered to be at least as newsworthy as the information concerning Johnson. Tr. 1310-1311, 1639. Furthermore, the Whitney Campaign denied any involvement in the release of the Johnson information, and the Star Tribune's failure to identify the source would have allowed that false statement to remain uncorrected just before the election. Tr. 1312-1313, 1639.

For much the same reason, a veiled reference to the source was viewed as an unsatisfactory solution. Since the Whitney Campaign disclaimed any responsibility, an attribution to a "Whitney Campaign adviser" or "Whitney supporter" would have left the public hanging, without any basis for evaluating the conflicting contentions and reaching the truth. Moreover, such a vague description of the source would have unfairly cast suspicion on a large number of innocent people, including Whitney himself. Tr. 1150-1152, 1405-1406, 1488. Finally, petitioner's identity was becoming more widely known and had been learned from independent sources, which the newspaper concluded voided the assurance of confidentiality. Tr. 1639-1641.

Accordingly, while Sturdevant disagreed with the decision and asked that her name not appear on the story (Tr. 452), the Star Tribune determined that a specific and complete article was the best course. Sturdevant advised petitioner that his name would be included in the article that would appear the next day. Tr. 455-457, 1144-1145.

2. The Editorial Decision Of The Pioneer Press Dispatch. The Pioneer Press Dispatch independently reached the same editorial judgment. Tr. 1370. The Dispatch sent a reporter to confirm the accuracy of the court records and spoke with Johnson about them. Tr. 1446. The newspaper also investigated petitioner's involvement in the Whitney Campaign (Tr. 1555) and obtained confirmation from Whitney Campaign director Olsten that petitioner was the source of the documents. Tr. 1437; J.A. 10.

The Dispatch's editorial judgments in this case were made by David Hall, the Executive Editor of the newspaper, in consultation with Doug Hennes, its City Editor. Tr. 1424, 1428-1432. Hall explained his reasoning as follows (Tr. 1430-1431):

> I felt like * * * it was a factor in her background, we were going to make people aware of it, but that given the * * * way it was being done, the proximity to the election, the oldness of the charge, that I thought that a part of the total story for the readers, people who were going to be asked in a very short time to cast a vote in an important election, an election involving the Governor of the State of Minnesota, that the readers needed to know the circumstances, the total circumstances under which that information was being made available, and let them draw their own conclusions about what the motives of that were.

In reaching his decision, Hall rejected the option of not running any story at all. Because "four news organizations" had Johnson's records, "I was rather certain that this story was going to be published. The information was going to be before voters. I wanted our readers to have

that information and I wanted them to have as complete * * * information as possible." Tr. 1438.

In addition, because of the importance of petitioner's identity and the Whitney Campaign's repeated denials that it was "behind bringing to light" Johnson's criminal record (J.A. 10; Tr. 1436-1437), Hall did not "ever consider[ ] doing it another way other than using his name." Tr. 1440. Hall testified that the AP's story was "journalistically deficient" because it did not name the source despite the conflict between Johnson's accusations that the Whitney Campaign had leaked the story and the Campaign's denials of any involvement. Tr. 1439.

Hall also explained his decision to reveal petitioner's name despite the objection of the reporter involved. First, Hall did not think that the reporter should have promised confidentiality without first checking with an editor, as required under the written policies of the Pioneer Press Dispatch. Tr. 1425-1427, 1440. More importantly, Hall believed that his principal obligation as editor of the newspaper was to "the readers [who] needed to be informed and served. * * * That was the overriding concern [in] making that decision." Tr. 1440-1441.

Hall testified that the decision to publish, although made under severe time constraints, was reached "reluctantly." Tr. 1442. While keeping promises was "an important factor to be considered," it was "but one of many" (Tr. 1463) and was outweighed here by the newspaper's paramount obligation to its readers and the voting public.

Because of the story's significance, Hall remained involved even after he made the decision to publish. Hall had the article read to him at home that evening, which is done only when "you are particularly concerned." Tr. 1432-1433. Hall then revised the draft to give less prominence to petitioner's identity and to set forth the facts "in a straightforward and nonjudgmental manner" that

would "let voters decide for themselves about how to treat this." Tr. 1434-1435; see also Tr. 1558-1559.

Before publication of the story, Salisbury called petitioner to advise him of the Dispatch's decision to print his name. Tr. 419. When petitioner learned that the decision was final, he gave the newspaper a further statement, part of which appeared in the article. Tr. 1555-1558.

C. The Litigation Below

1. Trial Court Proceedings. In 1982, petitioner brought this action in state court against the Star Tribune and the Pioneer Press Dispatch. Petitioner had no cause of action for defamation because the information disclosed was true and was not published with "actual malice" under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).[2] Nor could petitioner sue for an invasion of privacy, since Minnesota does not recognize that tort[3] and in any event petitioner's involvement in the Whitney Campaign and his role in the leak of Johnson's records were not private matters. Accordingly, petitioner's complaint alleged two claims: breach of contract and fraud.

The trial court denied the newspapers' motion for summary judgment. Pet. App. A77-A88. The court rejected the contention that the First Amendment prevented the imposition of liability in this case, stating that the "Court can perceive no constitutional dimension in the case at bar." *Id.* at A88. Following trial, the jury found for petitioner on both the contract and fraud counts, and it awarded $200,000 in compensatory damages and $500,000 in punitive damages. *Id.* at A71.

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[2] As the Minnesota Supreme Court correctly held, and as petitioner does not here dispute, petitioner "would qualify as a public figure." Pet. App. A5 n.3. Furthermore, in the context of the gubernatorial election, the source of the information against Johnson clearly was a matter of public interest.

[3] See, *e.g.*, *Ruzicka* v. *Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1302 (D. Minn. 1990).

2. The Minnesota Court Of Appeals Decision. The Minnesota Court of Appeals reversed the fraud and punitive damages verdicts but affirmed the breach-of-contract verdict. Pet. App. A19-A61. The court unanimously held that there was no fraud under Minnesota law in light of the "direct evidence of both the reporters' and editors' intentions" (*id.* at A40) and petitioner's concession that "the reporters themselves intended to perform the contracts and that they did not commit misrepresentations." *Ibid.* Because punitive damages rested solely on the invalid fraud count, the court also set aside that award. *Id.* at A41-A42.

By a divided vote, the court of appeals upheld the contract verdict. Believing that, under Minnesota law, petitioner and each newspaper had entered into a contract for confidentiality (Pet. App. A34-A35), the majority concluded that petitioner's lawsuit did not constitute state action, that in any event petitioner's interest in enforcement of his rights under the contract outweighed any First Amendment interest, and that the reporters' promises of confidentiality represented a waiver of any First Amendment right. *Id.* at A28-A37.

Judge Crippen dissented. Pet. App. A45-A61. He found state action in the "judicial decree that the [newspapers'] choice to publish information is unlawful and subject to the sanction of a money judgment." *Id.* at A47. On the merits, he concluded that an adverse judgment against the newspapers "usurps editorial decisionmaking and chills exercise of press freedom. * * * It is for editors, not for judges, to determine whether identification should be made and to decide when publication is important." *Id.* at A48-A49. Finally, Judge Crippen concluded that the newspapers' right to publish had not been waived because the reporters' promises were not valid contracts and in any event did not satisfy the "stringent conditions" required "for waiver of [the newspapers'] first amendment press freedoms." *Id.* at A55-A56.

3. The Minnesota Supreme Court Decision. The Minnesota Supreme Court unanimously affirmed the court of appeals' ruling that, as a matter of state law, judgment should be entered for the newspapers on the fraud count and that the punitive damages award must be set aside. The court explained (Pet. App. A6-A7) that petitioner

> admits that the reporters intended to keep their promises * * *. Moreover, * * * the editors had no intention to reveal [petitioner's] identity until later when more information was received and the matter was discussed with other editors. These facts do not support a fraud claim.

The court also reversed the breach-of-contract verdict on the ground that a reporter's promise of confidentiality is not legally enforceable and does not constitute a binding contract under Minnesota law. Pet. App. A7-A10. As the court explained, state law does not "consider binding every exchange of promises" and "[w]e are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract." *Id.* at A9. The court also recognized that promises of confidentiality can properly be disregarded in some situations. *Id.* at A7-A8 n.4.

In light of the special nature of the reporter-source relationship, "contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship." Pet. App. A10. Rather, characterizing the reporter-source relationship as "an 'I'll-scratch-your-back-if-you'll-scratch-mine' accommodation" (*id.* at A9), the court determined that Minnesota law requires "[e]ach party * * * [to] assum[e] the risks of what might happen, protected only by the good faith of the other party." *Id.* at A10. Even though "a contract cause of action is inappropriate" (*ibid.*), journalists' "keeping of promises is professionally im-

portant" and "it appears that journalistic ethics have adequately protected confidential sources." *Id.* at A8.

Having held that no contract existed under state law, the Minnesota Supreme Court considered whether a newspaper nonetheless could be held liable for breach of a reporter's promise of confidentiality under the doctrine of promissory estoppel, even though that theory neither had been presented to the jury nor briefed by the parties. Pet. App. A10-A11 & n.5. Under Minnesota law, "promissory estoppel implies a contract in law where none exists in fact" if "injustice can be avoided only by enforcing the promise." *Id.* at A10.

The court emphasized that it faced "a transaction fraught with moral ambiguity." Pet. App. A11. Petitioner sought "[a]nonymity" in order to have "deniability, but deniability, depending on the circumstances, may or may not deserve legal protection." *Ibid.* Thus, to determine whether it was necessary to impose liability for breach of the promise in order to avoid injustice, the court "inquir[ed] * * * into all the reasons why it was broken." *Ibid.*

Among the factors that the Minnesota Supreme Court weighed in the equitable balance were the same public policies that underlie the First Amendment. "In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated." Pet. App. A13.

> For example, was Cohen's name "newsworthy"? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough? The witnesses at trial were sharply divided on these questions. Under promissory estoppel, the court cannot avoid answering these questions * * *.

Ibid. In particular, the court's promissory estoppel analysis took into account that "in this case * * * the promise

of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." *Ibid.* On the other side of the scale, the court recognized that petitioner "willingly entered [the public debate] albeit hoping to do so on his own terms" (*ibid.*) in order to hide behind the protection of deniability.

Based on its equitable weighing of the competing factors, the court concluded that "[i]n this context, and considering the nature of the political story involved, it seems to us that the law best leaves the parties here to their trust in each other" and without a legally enforceable estoppel remedy. Pet. App. A13. The court emphasized that its ruling was narrow and that it was "not * * * decid[ing] more than we have to decide." *Id.* at A14. In other cases, the court pointed out, "[t]here may be instances where a confidential source would be entitled to a remedy such as promissory estoppel," depending upon the balance of the "interest in enforcing the promise to the source" against the "First Amendment considerations" in favor of full and candid disclosure (*ibid.*), and therefore the decision does not grant the press a license to break promises with impunity. "[B]ut this is not such a case," and petitioner's claim is not "sustainable under promissory estoppel." *Ibid.*

SUMMARY OF ARGUMENT

The Minnesota Supreme Court held, as a matter of state law, that petitioner failed to establish any claim for fraud or breach of contract. These state-law holdings were sufficient to overturn the jury verdict in its entirety.

Instead of simply reversing and ordering judgment for respondents, however, the Minnesota Supreme Court proceeded to discuss an issue that had not been presented to the jury or briefed by the parties: whether petitioner could enforce the reporters' assurances of confidentiality

under the doctrine of promissory estoppel. Under Minnesota law, promissory estoppel creates a legally implied obligation where no contract exists in fact, based on a flexible balancing of public policy considerations to determine whether enforcement of a promise is necessary to avoid injustice. The court explained that formal contract law is too rigid to be imposed on the unique relationship between reporter and source, but that promissory estoppel takes into account all reasons why the promise was broken, including the interest of the newspaper and the public in the publication of truthful political information.

The court concluded that petitioner did not have a legally enforceable promissory estoppel claim. On the one hand, petitioner had no substantial interest under state law in being permitted to conceal his involvement—and that of the Whitney Campaign—in the attack upon the DFL ticket. On the other hand, the newspapers' disclosure of petitioner's role was accurate and related directly to the rapidly approaching gubernatorial election. In these circumstances, there was no injustice in denying petitioner a legal remedy against the newspapers. At the same time, the court stated that the equitable balance could be different in other cases, emphasizing that its ruling on the particular facts presented here did not broadly authorize newspapers to violate promises of confidentiality in the future.

Petitioner's entire submission in this Court is premised on the assumption that the Minnesota Supreme Court believed itself constrained by the First Amendment to rule in favor of the newspapers. Although the court's promissory estoppel discussion does refer to the First Amendment, the opinion makes clear that the court simply weighed, as one relevant factor under state promissory estoppel law, the interest of the newspapers and the public in the dissemination of truthful political information. The federal Constitution does not speak to a state court's determination to further, wholly as a matter of state law and policy,

the same values that are embodied in the First Amendment. The decision below does not fairly suggest that it "rested * * * primarily on" or was "controlled" by federal law. *Michigan* v. *Long*, 463 U.S. 1032, 1042, 1044 (1983). Furthermore, in accord with fundamental principles of judicial restraint, any ambiguity in the decision should be resolved to avoid rather than raise a constitutional question. Because the judgment of the Minnesota Supreme Court rests on a state-law ground that is independent of federal law, this Court lacks jurisdiction to hear this case and the writ of certiorari should be dismissed.

In any event, even if the Court concludes that the jurisdictional presumption of *Michigan* v. *Long* is satisfied here, the result reached by the Minnesota Supreme Court is fully consistent with the First Amendment. Because the court held that no contract or fraud claim accrued under Minnesota law, the federal question raised is not, as petitioner asserts, whether the First Amendment overrides rights recognized under state law; instead, it is whether the court erred in giving weight to First Amendment considerations in the equitable balance required by the state-law doctrine of promissory estoppel. Since, under state law, petitioner had no substantial interest in "deniability," even a modest First Amendment interest in public disclosure would sustain the judgment below. But in fact the decisions of this Court establish that the publication of truthful information concerning a political campaign is at the core of the First Amendment's protection, and hence the newspapers' identification of petitioner was supported by a compelling constitutional interest that manifestly outweighed petitioner's limited interest under Minnesota law.

Petitioner's argument reduces to the assertion that promises of confidentiality may never be overridden, no matter how strong the public interest in disclosure. Such an inflexible approach finds no support in legal precedent or

journalistic ethics. Responsible journalists throughout the country have recognized that, on rare but important occasions, promises of confidentiality must give way to a higher duty of full disclosure to the public. In this context, the Minnesota Supreme Court properly weighed *all* relevant considerations of public policy—including the public interest in free discussion of political issues—in the equitable balance.

Petitioner cannot avoid the import of the First Amendment by arguing that there is no state action in this case. In light of the Minnesota Supreme Court's holding that no contract existed, any cause of action against the newspapers must rest on promissory estoppel, which creates a legal obligation never assumed by the parties. State law also would provide judicial enforcement of that legal obligation. Imposing and enforcing such an obligation would plainly constitute state action under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Finally, contrary to petitioner's assertion, the reporters' promises of confidentiality did not effect a waiver of any First Amendment rights. Petitioner's contention begs the question before the Court, which is whether the First Amendment protects the newspapers' disclosure of his identity *notwithstanding* the reporters' assurances. Furthermore, because the reporters did not possess sufficient information to make an informed and conscientious assessment of the newsworthiness of petitioner's role, their promises did not meet the stringent standard of a knowing and intelligent waiver—a standard that is especially appropriate here in view of the public's interest in the publication of petitioner's identity and the responsibility of editors as well as reporters for the exercise of the newspapers' First Amendment rights.

ARGUMENT

I. BECAUSE THE DECISION BELOW IS GROUNDED IN STATE RATHER THAN FEDERAL LAW, THE WRIT OF CERTIORARI SHOULD BE DISMISSED

The Minnesota Supreme Court's judgment is grounded in state rather than federal law. Because state law provides an independent and adequate ground for the decision below, the writ of certiorari should be dismissed.

It is axiomatic in our federal system that this Court lacks jurisdiction to review a state court's determination of state law. "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945). Under this principle, "the views of the State's highest court with respect to state law are binding on the federal courts." *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983).

As a corollary to this jurisdictional limitation, it is well settled that the Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U.S. at 125. Accordingly, when a state decision refers to both federal and state law and the state-law ruling is "an independent and adequate * * * ground supporting the judgment below * * *, our review is at an end, for we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment." *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 387 (1986). As the Court explained in *Herb* v. *Pitcairn*, 324 U.S. at 126:

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Not all state-law rulings, of course, are independent of federal law. If "the state court felt *compelled* by what it understood to be federal constitutional considerations to construe * * * its own law in the manner it did, then we will not treat a normally adequate state ground as independent." *Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983) (emphasis added; citations and internal quotation marks omitted). Likewise, the Court has jurisdiction "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter." *Ibid.* But, if the federal authorities cited by the state court "are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached," the ruling is one of state law and outside the jurisdiction of this Court. *Id.* at 1041.

In cases where both state and federal authorities are cited, it may be unclear whether the state ground is independent of federal law. See *Long*, 463 U.S. at 1037-1040. To guide resolution of such cases, the Court has established the following presumption: "when * * * a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-1041.

Under the foregoing principles, the decision below rests on independent (and unquestionably adequate) state-law grounds and therefore is not subject to review in this Court. With respect to the holdings that petitioner failed to establish a claim for fraud or breach of contract, it is abundantly clear that these rulings were premised entirely on Minnesota law. The only authorities cited by the Minnesota Supreme Court involved decisions of state law, and there is not so much as a mention of federal law in these

portions of its opinion. See Pet. App. A6-A10. Indeed, the court explicitly disclaimed any consideration of "First Amendment implications" in deciding those issues. *Id.* at A12-A13. These circumstances amply meet the "plain statement" rule of *Long*.

The same conclusion also applies to the court's analysis of promissory estoppel. *First*, the court relied solely on state-law authorities to support its promissory estoppel discussion. See Pet. App. A10-A14. Thus, it does not "fairly appear[ ] in this case that the [Minnesota] Supreme Court rested its decision primarily on federal law." *Long*, 463 U.S. at 1044.[4]

While the First Amendment is referred to in several places, a fair reading of the opinion demonstrates that the court merely weighed, as one of the policies to be considered in the equitable balance under state promissory estoppel law, "the same considerations that are weighed for whether the First Amendment has been violated." Pet. App. A13. The state court surely was free, as a matter of Minnesota law, to apply the flexible state doctrine of promissory estoppel in a manner that furthers the same policies of free expression that underlie the First Amendment.[5] The Minnesota Supreme Court simply considered

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[4] Indeed, only two federal decisions are even cited in the promissory estoppel analysis: *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), which the court adverted to (Pet. App. A13) in explaining that state promissory estoppel law required courts to inquire into the reasons why confidentiality was breached "even though to do so would mean second-guessing the newspaper editors"; and *Florida Star* v. *B.J.F.*, 109 S. Ct. 2603 (1989), which the court quoted (Pet. App. A14) to reinforce the wisdom of rendering a narrow decision that does not extend beyond the " 'discrete factual context.' "

[5] Under Minnesota law, promissory estoppel "is an equitable doctrine" that is applicable where necessary "to avoid injustice." *AFSCME Councils* v. *Sundquist*, 338 N.W.2d 560, 568 & n.10 (Minn. 1983). See also, *e.g.*, *United Elec. Corp.* v. *All Serv. Elec., Inc.*, 256 N.W.2d 92, 95, 96 (Minn. 1977) (citation omitted) ("promis-

(Footnote continued on following page)

the policies embodied in the First Amendment to be relevant and persuasive as a matter of state law, and it therefore looked to those policies "only for the purpose of guidance" (*Long*, 463 U.S. at 1041); this approach does not suggest that the First Amendment itself "compel[led] the result that the court * * * reached" (*ibid.*) or " 'controlled the decision below.' " *Id.* at 1040 (citation omitted).

To be sure, certain passages in the Minnesota Supreme Court's opinion, if taken out of context, might be read to go further and hold that the First Amendment required the result reached. As just explained, however, that is not a fair reading of the decision as a whole. This Court "reviews judgments, not statements in opinions," and when "unnecessarily broad statements are made," it is the Court's "duty to look beyond the broad sweep of the

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[5] *continued*
sory estoppel is equitable in nature" and applies " 'if injustice can be avoided only by enforcement of the promise' "). The hallmark of this doctrine is its flexibility, which enables courts to balance all relevant policy considerations; by contrast, "[a] conventional contract approach, with its strict rules of offer and acceptance, tends to deprive the analysis of the relationship between the [parties] of a needed flexibility." *Christensen* v. *Minneapolis Mun. Emp. Retire. Bd.*, 331 N.W.2d 740, 747 (Minn. 1983). Under promissory estoppel, courts analyze each case in the manner that is most "realistic, fair and practical" and, in particular, in light of the "paramount * * * public interest." *Id.* at 748.

Well before the First Amendment was applied to defamation claims in *New York Times Co.* v. *Sullivan*, the Minnesota Supreme Court had established a common-law privilege for matters of public concern in order to protect the paramount public interest in free expression. See *Marks* v. *Baker*, 9 N.W. 678 (Minn. 1881); *Hammersten* v. *Reiling*, 115 N.W.2d 259, 264 (Minn. 1962). This privilege has particular application to the conduct of governmental affairs, including election campaigns. See *Wilcox* v. *Moore*, 71 N.W. 917, 918 (Minn. 1897) ("[i]f [a candidate or official] has resorted to a dishonorable trick, it is proper to publish the fact"); *Friedell* v. *Blakely Printing Co.*, 203 N.W. 974, 975 (Minn. 1925), cited in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 n.20 (1964). Accordingly, it was entirely proper for the Minnesota Supreme Court to consider, under state law, the goal of free political expression as a relevant factor in the equitable promissory estoppel balance.

language and determine for [itself] precisely the ground on which the judgment rests." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956). See also, *e.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 734-735 (1978). As this case well illustrates, indiscriminate application of *Long* would "cause the Supreme Court to waste its limited resources by reaching out to make unnecessary decisions on grave and difficult federal questions." P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 553-554 (3d ed. 1988).

Second, the conclusion that the Minnesota Supreme Court's decision does not rest on federal law is confirmed by the fact that the court did not resolve the related issue of state action. The Minnesota Court of Appeals had ruled that no state action was present in this case and therefore that the First Amendment was inapplicable. See Pet. App. A28-A31. If the Minnesota Supreme Court had intended to base its decision on the First Amendment, it would have been required to decide the question of state action. In fact, however, the court simply noted the question in passing and set out (without deciding) the parties' competing contentions. *Id.* at A12 n.6. The court's failure to adjudicate the state action issue is compelling evidence that its decision is not premised on the commands of the First Amendment.[6]

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[6] In the same vein, the Minnesota Supreme Court never resolved the "waiver" issue relied on by the appellate court (Pet. App. A35-A37) as a ground for refusing to apply the First Amendment. Likewise, the court simply balanced the conflicting claims of petitioner and respondents as required by state estoppel law, and did *not* attempt to apply the First Amendment tests established by this Court, which require that a state interest be not only "legitimate" but "compelling" (*Brown* v. *Hartlage*, 456 U.S. 45, 53-54 (1982)) and "of the highest order" (*Florida Star* v. *B.J.F.*, 109 S. Ct. 2603, 2609 (1989)) to outweigh First Amendment interests. Plainly, the Minnesota Supreme Court could not have bypassed these issues if it had predicated its ruling on the First Amendment.

Third, once unreviewable issues of state law are removed from consideration in this case, it is evident that no meaningful First Amendment question is left for decision. The Minnesota Supreme Court recognized, as a matter of state law, that petitioner had no substantial "common law interest in [enforcing] a promise of anonymity" (Pet. App. A13) because he "willingly entered" the "public debate" (*ibid.*), and his effort to use the media to impugn the opposing candidate while insulating his own candidate from accountability was "fraught with moral ambiguity." *Id.* at A11. Indeed, the promise of "deniability" did not even rise to the level of a contract right under Minnesota law. Since the Minnesota Supreme Court disclaimed any significant state interest in allowing petitioner to enforce a promise of anonymity, and since that issue is entirely one of state law that this Court cannot reconsider, any First Amendment interest on the other side of the scale would be sufficient to outweigh petitioner's claim. For this reason, whatever First Amendment issue may inhere in this case can come out only one way—an affirmance of the judgment below. Such a trivial and preordained question hardly is appropriate for this Court's review.

Fourth, the absence of a reviewable federal issue is further shown by the fact that the Minnesota Supreme Court's discussion of promissory estoppel is dictum. That issue was never presented to the jury or briefed at any stage. A claim never raised at trial and waived on appeal cannot support a damages award. See, *e.g.*, *Flooring Removal, Inc.* v. *Ryerson*, 447 N.W.2d 429, 430 (Minn. 1989). Accordingly, the Minnesota Supreme Court's promissory estoppel analysis had no effect on petitioner and simply represents a warning for future cases that newspapers do not possess a blanket right to violate promises of confidentiality. On this record, the issues posed by petitioner come to this Court "in [a] highly abstract form" inappropriate for definitive resolution. *Rescue Army* v.

Municipal Court, 331 U.S. 549, 575 (1947). Both prudential and jurisdictional considerations forbid this Court to review such an advisory opinion or to declare constitutional principles that have no realistic prospect of affecting the judgment below. See *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

Finally, prudential principles of judicial restraint counsel against review in this case. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445 (1988). In prior cases, the "Court has relied on that principle * * * to resolve doubts about the independence of state-law decisions in favor of an interpretation that avoids a constitutional question." *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 158 (1984). Moreover, the rule that the Court reviews judgments rather than statements in opinions takes on "special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues." *FCC* v. *Pacifica Foundation*, 438 U.S. at 734. See also *Black* v. *Cutter Laboratories*, 351 U.S. at 299-300 ("even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question"). Here, the Court's "responsibility to avoid unnecessary constitutional adjudication" (*Three Affiliated Tribes*, 467 U.S. at 158) requires deference to the reasonably available state-law ground for sustaining the decision below, thereby obviating the federal constitutional issue that otherwise would be presented.

For these reasons, the writ of certiorari should be dismissed. See, *e.g.*, *Ohio* v. *Huertas*, cert. dismissed as improvidently granted, No. 89-1944 (Jan. 22, 1991); *Colorado* v. *Nunez*, 465 U.S. 324 (1984) ("[t]he writ is dismissed as improvidently granted, it appearing that the judgment of the court below rested on independent and adequate

state grounds"); *Florida* v. *Casal*, 462 U.S. 637 (1983) (same). Dismissal is required even though the jurisdictional defect becomes apparent after the case has been briefed and argued on the merits. See, *e.g.*, *Benz* v. *New York State Thruway Authority*, 369 U.S. 147 (1962); *Black* v. *Cutter Laboratories*, *supra*. If the Court is convinced after "the case has been fully briefed and argued" that "a jurisdictional fault" exists, it "will be compelled to dismiss the case * * * despite the expenditures of time and energies." R. Stern, E. Gressman, & S. Shapiro, SUPREME COURT PRACTICE 174 (6th ed. 1986).[7]

II. THE MINNESOTA SUPREME COURT DID NOT ERR IN GIVING WEIGHT TO FIRST AMENDMENT CONSIDERATIONS

If, contrary to the above submission, the Court determines under *Michigan* v. *Long* that the decision below does not rest upon an independent state ground, the judgment of the Minnesota Supreme Court should be affirmed. Assuming that the court's generalized references to the First Amendment are sufficient to invoke *Long*'s presumption of jurisdiction, the fairest reading of the decision on the merits is that the Minnesota Supreme Court *chose* to take First Amendment considerations into account in its promissory estoppel analysis. Nothing in the First Amendment prohibited the state court from considering First Amendment policies as one of the relevant factors in its equitable balancing.

Even if this Court concludes, however, that the Minnesota Supreme Court believed it was *required* to weigh First Amendment considerations in the balance, there was

[7] At the least, the Court should remand this case to the Minnesota Supreme Court for clarification of the basis for its decision. See, *e.g.*, *Long*, 463 U.S. at 1041 n.6 (remand is appropriate where "clarification is necessary or desirable"); *Capital Cities Media, Inc.* v. *Toole*, 466 U.S. 378 (1984) (post-*Long* remand to clarify whether decision was based on state or federal ground).

no constitutional error in the judgment below. To begin with, the court applied a simple balancing approach in holding in favor of the newspapers. This is the least protective standard conceivable for First Amendment rights and, unlike other tests (such as the "compelling state interest" test), it places no special priority on the First Amendment interests involved. That legal test plainly was not, as petitioner argues, too solicitous of First Amendment values.

Moreover, the sole claim raised by petitioner is that the First Amendment is *irrelevant* to the Minnesota Supreme Court's analysis, *i.e.*, that the court erred in giving *any* weight to First Amendment interests. That claim is insubstantial. In light of this Court's precedents, it is impossible to see how the First Amendment could not be relevant to a state court's decision—under general principles of equity and public policy—whether to impose damages liability on a newspaper for the publication of truthful political information. The Court need decide no more to dispose of petitioner's First Amendment argument.

In any event, it is completely untenable to conclude that the Minnesota Supreme Court gave too much weight to First Amendment interests in applying the balancing test. On one side of the scale, the court held that petitioner had no substantial state-protected interest in light of two factors: state law did not provide him with a contractual right to enforce the promise of anonymity, and failure to enforce the promise would not be "unjust" (Pet. App. A13) because of the "moral ambiguity" of petitioner's eleventh-hour scheme to discredit Johnson's political campaign while maintaining "deniability." *Id.* at A11. Given petitioner's negligible interest under Minnesota law, even a modest First Amendment interest on the other side of the scale would be sufficient to predominate. But in fact, as the Minnesota Supreme Court correctly recognized, there was a strong First Amendment interest in the publication of *truthful information* directly relevant to a

matter of *substantial public importance*—an impending statewide gubernatorial election. There can be no doubt either that such publication is at the core of the First Amendment's protections or that this significant First Amendment interest outweighs petitioner's limited interest under Minnesota law.[8]

Before addressing these points in greater detail, it is necessary to correct petitioner's misstatement of the issue presented for review. First, contrary to the Question Presented in his petition and brief, the Minnesota Supreme Court did not "grant newspapers immunity" from damages for breach of promises of confidentiality. See also Pet. Br. 26-27. Quite the opposite, the court made unmistakably clear that in other circumstances a confidential source could "be entitled to a remedy such as promissory estoppel" and that, in holding for the newspapers "in this case," it was neither "decid[ing] more than we have to decide" nor going beyond this " 'discrete factual context.' " Pet. App. A13-A14 (citation omitted). Such a narrow and carefully limited result is a far cry from the asserted immunity that petitioner protests against.

Second, and more fundamentally, petitioner repeatedly but incorrectly treats this case as though it involved a legally enforceable "contract[ ]" (Pet. Br. 17) that was overridden by the First Amendment. In his view, the issue here concerns a "bargain[ ]" between the parties (*id.* at 15) based upon their "intent." *Id.* at 17. As explained above (see pages 13-14, *supra*), however, this is a totally erroneous description of the decision of the Minnesota Supreme Court, which *expressly held that there was no contract under Minnesota law and that the parties "intended [to create] none."* Pet. App. A9 (emphasis added). Once petitioner's mischaracterization of the state-law basis for his claim is corrected, his constitutional argument largely collapses: the issue is not whether First Amendment protection for truthful political speech supersedes his contract right to enforce a promise of confidentiality, but whether First Amendment considerations have *any* role to play in deciding if a state may impose liability on the media under the equitable doctrine of promissory estoppel. That, we submit, is not a fairly debatable issue under this Court's precedents.

[8] Petitioner (Br. 18-19), like the Minnesota Court of Appeals (Pet. App. A33), errs in treating a reporter's promise of confidentiality like a routine commercial arrangement. Our submission here is that promises not to publish truthful and important political information present special First Amendment issues. The trial court correctly recognized this, stating "I understand you are not talking about buying ink for the newspaper." 8/22/88 Tr. 13.

A. The First Amendment Protects The Publication Of Truthful Information About A Political Campaign

The newspapers' disclosure of petitioner's identity in this case was both completely accurate and directly relevant to a matter of the highest public concern—the Minnesota gubernatorial election then six days away. This Court's decisions conclusively establish that the right to publish truthful information regarding an imminent political election lies at the core of the First Amendment's protections. As such, this First Amendment interest is both relevant and entitled to great weight in deciding whether state law may, consistent with the Constitution, hold a newspaper accountable in damages for publishing accurate political information.

Because "the First Amendment's primary aim is the full protection of speech upon issues of public concern," the Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145, 154 (1983) (citation omitted). In particular, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental

affairs," including "discussions of candidates." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). Indeed, "[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign," and therefore the First Amendment " 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " *Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982) (citation omitted). Because "[v]igorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty," it is a "value [that] must be protected with special vigilance." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2695, 2696 (1989).

In addition, this Court consistently has recognized the importance of truthful information in our society. As it recently held, " '[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, *absent a need to further a state interest of the highest order*.' " *Florida Star* v. *B.J.F.*, 109 S. Ct. 2603, 2609 (1989) (citation omitted; emphasis added). The compelling constitutional value in the dissemination of truthful information has been found to override a state's interest in preserving the privacy of a rape victim (*Florida Star*; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)), protecting the identity of juvenile offenders (*Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977)), maintaining the secrecy of a pending judicial disciplinary inquiry (*Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978)) or a completed grand jury proceeding (*Butterworth* v. *Smith*, 110 S. Ct. 1376 (1990)), and safeguarding an individual from embarrassing publicity (*Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986)) or intentional infliction of emotional distress (*Hustler Magazine* v. *Falwell*, 485 U.S. 46 (1988)).

Under these decisions, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Butterworth*, 443 U.S. at 102.[9]

Against this background, and in the particular circumstances of this case, the First Amendment interest in publishing petitioner's identity clearly was relevant to the Minnesota Supreme Court's analysis and outweighed petitioner's minimal interest in denying responsibility for his attack on a political opponent.[10] As truthful information of immediate importance to an upcoming political election, it was precisely the sort of information necessary for "voters * * * to inform themselves about the candidates and the campaign issues." *Eu* v. *San Francisco Democratic Comm.*, 489 U.S. 214, 223 (1989). Petitioner's secretive role in the use of decade-old minor charges to attack the DFL ticket, undertaken in his capacity as a Whitney Campaign adviser and in league with others involved in the Whitney Campaign and the I-R party, raised serious issues concerning the integrity of the Campaign and potentially of Wheelock Whitney himself. As Judge Crippen observed, petitioner was "a political operative" involved in "a political scheme to broadcast a political attack but at the same time to avoid responsibility for the act"; he thus "solicited promises from reporters to serve his personal interests, to hide political conduct that others would believe to be shabby." Pet. App. A53, A54, A56. Furthermore, even if reasonable minds might differ over whether petitioner and the other Whitney supporters

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[9] *Cox Broadcasting* makes clear that civil damages awards, no less than criminal penalties or other governmental sanctions, are subject to this First Amendment standard.

[10] See, *e.g.*, *Butterworth*, 110 S. Ct. at 1380 ("[w]e must thus balance respondent's asserted First Amendment rights against Florida's interests"); *Connick*, 461 U.S. at 148 n.7, 150 ("[t]he inquiry into the protected status of speech is one of law, not fact," and "the courts must reach the most appropriate possible balance of the competing interests").

were engaged in "dirty tricks,"[11] that was for the voters of Minnesota to decide, and disclosure of petitioner as the source of the leaks was highly relevant to their informed decision. See *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791-792 (1978) ("the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," and "[t]hey may consider, in making their judgment, the source and credibility of the advocate"); see also *id.* at 792 n.32; *Meese* v. *Keene*, 481 U.S. 465, 480-482 (1987).

What is more, petitioner's identity as the source of the leak was rapidly spreading and could not be held in secrecy in any event. The newspapers had independent confirmation of petitioner's role before they published his name. See pages 6-9, *supra*. In addition, four news organizations were aware of petitioner's identity; a number of people in the Whitney Campaign knew of his involvement, including those who had met with him as well as others whom Ismach had informed; and Flakne's name was on a publicly available sign-out sheet at the courthouse, which provided a key link back to the Campaign and petitioner. See pages 3-6, *supra*. Indeed, petitioner himself had told his employer of the attack on Johnson and his participation in it. Tr. 183-184, 355, 1499-1502. In these circumstances, petitioner had no overriding interest in the reporters' assurances of anonymity, and the publication of this truthful and important political information fell squarely within the shelter of the First Amendment.[12]

[11] The trial record shows that several people regarded the scheme as a dirty trick. Tr. 332-333, 504, 840, 1500-1504. Indeed, petitioner himself recognized that his employer might consider his actions to be "inappropriate." Tr. 353-355; see also Tr. 612.

[12] See, *e.g.*, *Florida Star*, 109 S. Ct. at 2612 (the First Amendment forecloses privacy claims where "liability follows automatically from publication * * * regardless of whether the identity of the victim is already known throughout the community * * * or whether the identity of the victim has otherwise become a reasonable subject of public concern").

Petitioner seeks to avoid this constitutional conclusion on three grounds.[13] First, he suggests (Br. 18-20) that the enforcement of contracts is a compelling state interest that outweighs the First Amendment interest in the publication of truthful political information. Once again, however, petitioner simply ignores the fact that the Minnesota Supreme Court held that *there was no contract under state law*. See pages 13-14, 28-29, *supra*. Moreover, again as a matter of state law, the court held that petitioner did not have a substantial interest in enforcing the assurance of confidentiality and that the absence of a legal remedy would not be unjust. See pages 14-15, 24, *supra*. Finally, petitioner nowhere explains why this asserted state interest is of a higher order under the Constitution than the various state interests in privacy and confidentiality that this Court previously has held insufficient to outweigh the First Amendment, and it is difficult to comprehend how petitioner could have a greater interest in anonymity than does the innocent victim of a brutal rape, an accused juvenile offender who is awaiting trial, or a judge against whom an allegation of judicial misconduct has been made but not yet resolved. See pages 30-31, *supra*.

Second, petitioner asserts that the *Florida Star* line of cases is irrelevant here because the newspapers "unlaw-

[13] Contrary to petitioner's assertion (Br. 12, 18-19, 26), neither *Snepp* v. *United States*, 444 U.S. 507 (1980), nor *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), suggests that the First Amendment would countenance imposition of liability in the present circumstances. *Snepp* involved national security and a fiduciary obligation of trust, both of which are governmental interests of the highest order. Moreover, *Snepp* did not prohibit or penalize the publication of any information but simply approved a pre-publication review process. Indeed, in light of the vital governmental interests and the limited governmental intrusion, the Court observed that the review process would not have violated the First Amendment even in the absence of the employee's agreement to submit material for clearance. 444 U.S. at 509 n.3, 515 n.11. Likewise irrelevant is *Seattle Times*, which considered limitations on the use of information obtained pursuant to the coercive powers of the courts; that issue has no bearing here.

fully" (Br. 26) and "through intentional wrongdoing" (*id.* at 24) learned that he was the source of the leaked records. Petitioner's premise, however, cannot be squared with the undisputed evidence that the newspapers did nothing unlawful or improper in securing the information they later published. Indeed, the Minnesota Supreme Court explicitly rejected his claim of fraud on the part of either the reporters or the editors. See Pet. App. A7. In light of that ruling, petitioner's only remaining complaint is that *publication* of his identity was wrongful, but that is irrelevant to the question whether the information was "acquired unlawfully" under *Florida Star*.[14] It also avails petitioner nothing to accuse the newspapers (Br. 24-25) of engaging in the "use of lies" and "calculated falsehoods." The decisions of this Court to which petitioner refers involved publications that were *false*, not, as in this case, ones that are true. The newspapers' decision to publish petitioner's name does not transform such articles into "lies" and "falsehoods."[15]

Finally, petitioner urges (Br. 29) that the newspapers should have followed "options" other than the publication of a story that disclosed his name. Such second-guessing, however, is antithetical to the editorial freedom that is protected by the First Amendment. See *FCC* v. *League*

[14] For this reason, petitioner plainly errs in relying (Br. 30) on *Galella* v. *Onassis*, 487 F.2d 986 (2d Cir. 1973), and *Dietemann* v. *Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). In both of those cases, the press engaged in tortious (and even criminal) misconduct in acquiring the materials in question. Here, by contrast, as the decision below conclusively establishes, the newspapers committed no unlawful or wrongful act in receiving the information petitioner offered them.

[15] Given this Court's willingness "to insulate even *demonstrably* false speech from liability" in order to "provide 'breathing space' for true speech on matters of public concern" (*Philadelphia Newspapers*, 475 U.S. at 778 (emphasis in original; citations omitted)), it would be highly ironic if the First Amendment did not afford any protection to the publication of the truthful political information at issue in this case.

of Women Voters, 468 U.S. 364, 375-376 (1984); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-258 (1974); Powe, *Tornillo*, 1987 SUP. CT. REV. 345.[16] Furthermore, none of the suggested alternatives would have served the paramount First Amendment interest in providing voters all relevant facts about the election. If no story had been published at all, the public would have been denied the information about Marlene Johnson's criminal record, which was a matter of legitimate public concern. See, *e.g.*, *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 300 (1971) ("a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office' "); *Garrison* v. *Louisiana*, 379 U.S. 64, 76-77 (1964). Similarly, failure to run an article would have concealed the effort of the Whitney Campaign to discredit Johnson, which itself was important and newsworthy.[17] If, on the other hand, the Johnson story had been published without any mention of the source of the information, the activities of the Whitney Campaign likewise would not have come to light; although that is precisely the result petitioner hoped to accomplish, it is not one that furthers the First

[16] Contrary to petitioner's assertion (Br. 15), *Herbert* v. *Lando*, 441 U.S. 153 (1979), did not eliminate the constitutional protection accorded a newspaper's editorial judgment. Rather, the Court merely held that the editorial process may be relevant to the issue of actual malice under *New York Times Co.* v. *Sullivan* and therefore is not "immune from any inquiry whatsoever." 441 U.S. at 168. The Court's ruling that discovery procedures would not indirectly violate press freedoms has no relevance to the issue presented here of the right of the newspapers to exercise editorial judgment to decide what to print. Indeed, *Herbert* specifically cautioned that "if inquiry into editorial conclusions threatens the suppression not only of information known or strongly suspected to be unreliable but also of truthful information, the issue would be quite different." *Id.* at 172. See also *id.* at 174 ("[t]his is not to say that the editorial discussions or exchanges have no constitutional protection").

[17] Petitioner's expert agreed that the source of the leaked information could have been considered newsworthy. Tr. 735.

Amendment interest in full and candid disclosure to the electorate, especially since Whitney officials were denying that the Campaign had any involvement in disseminating Johnson's records. And in light of the Campaign's denials, a veiled reference to the source—such as a "Republican activist" (Pet. Br. 29)—would have given the public no basis for discerning the truth and would unfairly have implicated a large number of innocent people.

At trial, petitioner's journalism expert, Arnold Ismach,[18] asserted that the newspapers had made "a mistake in judgment that resulted in an unethical act that was unnecessary." Tr. 717; see also Tr. 711. But if the " 'breathing space' " required "for true speech on matters of public concern" means anything (*Philadelphia Newspapers*, 475 U.S. at 778), it is that liability cannot be imposed on the media based on "mistakes in judgment" or hindsight disagreements about what was "necessary" for the public to know. Petitioner's proposed approach is incompatible with fundamental First Amendment values and, because it does not advance a significant (let alone compelling) state interest recognized by state law, it would impermissibly infringe the core right to publish truthful political information.[19]

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[18] As recounted above (see pages 3-5, *supra*), Ismach was the media consultant to the Whitney Campaign and participated with petitioner in the plan to leak Marlene Johnson's arrest records to the media.

[19] Petitioner's approach also would open up a veritable Pandora's box of intractable problems for the media and the courts. See Denniston, *A Right to Expose Sources?*, WASH. JOURNALISM REV., Nov. 1988, at 18 ("if the Constitution has nothing to say concerning a news organization's editorial choices about the way it deals with sources * * *, the whole range of source-reporter relationships would be subject to unlimited review by judges and juries whenever the source had a complaint that could be translated into a lawsuit"). For example, can a source sue for an unflattering or disparaging article if he asserts that the reporter promised to write a "favorable" article? See *Strick* v. *Superior Court*, 192 Cal.

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B. There Is No Conflict Between The Requirements Of The First Amendment And Applicable Principles Of Journalistic Ethics

Attempting to divert attention from the fact that he had no enforceable rights under Minnesota contract or fraud law, petitioner (Br. 16, 24-31), like the dissenting justices below (Pet. App. A14-A18), launches a rhetorical attack on the newspapers' actions as a breach of journalistic ethics. As this Court has recognized, however, evolving standards of journalism do not define the scope of the First Amendment. See *Harte-Hanks Communications*, 109 S. Ct. at 2684-2686.

More importantly, however, petitioner is simply wrong in his appraisal of journalistic ethics. The newspapers' decisions to publish, while difficult and even agonizing, were entirely consistent with ethical standards. Petitioner's covert efforts to attack the DFL ticket in the closing days of the election campaign confronted the newspapers with a moral dilemma in which two journalistic principles—the obligation to fully inform the public, and the responsibility to honor a promise to a source—were

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[19] *continued*

Rptr. 314, 320 n.5 (Ct. App. 1983). Or can a source bring suit if a reporter promises that he will not "identify" the source, but the article contains sufficient detail that the source believes he is identifiable? See *Ruzicka* v. *Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1291 (D. Minn. 1990); see generally D. Gillmor, J. Barron, T. Simon, & H. Terry, MASS COMMUNICATION LAW 362 (5th ed. 1990) ("Media lawyers see endless possibilities for plaintiffs using a contract approach. Would it be a breach of contract to * * * surprise a source by disparaging his views, or to disappoint a source by playing down statements she assumed would get front-page attention?"). In fact, the lower-court decisions in this case, until reversed by the Minnesota Supreme Court, had encouraged some sources to try "to negotiate in detail how confidential information could be used, and even to demand that the article would be given the slant sought by the source, under the threat of a contract violation suit if they were not satisfied." N.Y. Times, July 21, 1990, at 6, col.4 (summary of statement of Bruce W. Sanford).

placed in conflict. After extensive and conscientious consideration of their responsibilities to petitioner *and* the public, the newspapers reached a reasonable and good-faith resolution of that ethical conflict.

Inherent in petitioner's argument to the contrary is the belief that reporters' promises are *never* to be broken. As the present case shows, however, such an absolutist view ignores the danger that confidential sources may seek to manipulate the press and mislead the public by cloaking their identity in anonymity.[20] Petitioner's rigid and oversimplified theory has no place either in ethics or in law. On the contrary, it is generally recognized that a journalist's promise to a source may properly be disregarded in some circumstances. Pet. App. A7-A8 n.4. In fact, petitioner's own trial expert, Arnold Ismach, conceded that a reporter can—*and should*—divulge confidential information in order to prevent the commission of a serious crime.[21]

In addition to the above example, there are a number of other instances in which responsible journalists have

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[20] See H. Goodwin, GROPING FOR ETHICS IN JOURNALISM 120, 129 (2d ed. 1987) ("Many journalists are worried about sources using them when they refuse to be identified with the information they pass along. * * * Being used * * * is what bothers journalists about arrangements that restrict their ability to tell the whole story—not just what was said, but who said it and why"); Smyser, *There Are Sources and Then There Are "Sourcerers"*, 5 SOC. RESP.: JOURNALISM, L., MED. 13, 14-15 (1979) ("[A] 'sourcerer' does not usually have the public interest as his or her primary objective" and "his or her purpose is not so much to pass information along to the public through the press * * * [as] it is to use the press, and ultimately the public, as a means to an end. * * * And because their motivation is something other than a desire for an informed public, too many times what they induce reporters and editors to plant with the public is not so much information as it is propaganda or, not infrequently, misinformation").

[21] See Tr. 743-744. Other witnesses at trial agreed that a promise of confidentiality is not absolute in all situations. Tr. 915-916, 1179-1180, 1221-1224, 1274-1275, 1329.

concluded that a promise to a source should be breached *to protect the broader public interest*:

- During the Iran-Contra hearings, Colonel Oliver North accused Congress of leaking secret intelligence information relating to the *Achille Lauro* hijacking. In fact, North himself had been the confidential source of those leaks. Despite its promise of confidentiality, *Newsweek* ran an article stating that "the colonel did not mention that details of the interception, first published in a *Newsweek* cover story, were leaked by none other than North himself." NEWSWEEK, July 27, 1987, at 16; Pet. App. A8 n.4.
- A *Washington Post* reporter interviewed presidential candidate Jesse Jackson on the condition that Jackson not be identified. Jackson then used derogatory ethnic characterizations of Jews and stated his view that they were unduly preoccupied with Israel. Despite the promise of confidential treatment, the reporter wrote that "[i]n private conversations with reporters, Jackson has referred to Jews as 'Hymie' and to New York as 'Hymietown.' " The reporter defended his action because Jackson "was presenting himself for the highest elective office in this land" and "he had said something that appeared to at least stereotype if not * * * denigrate a group of American electors. That statement ought to be brought to the public's attention." H. Goodwin, GROPING FOR ETHICS IN JOURNALISM 126-127 (2d ed. 1987).
- During the 1988 Democratic presidential primary campaign, a confidential source released a videotape showing that Senator Joseph Biden had plagiarized a speech of British politician Neil Kinnock. Notwithstanding a promise of confidentiality, the *New York Times* disclosed that the tape had not come from the Gephardt campaign, which had the practical effect of revealing that the source was the Dukakis campaign. As a result, John Sasso, Dukakis's campaign manager, was identified as the source and fired from the campaign. Tr. 747-750, 1320-1322, 1377-1379, 1381-1382, 1384; Langley & Levine, *Broken Promises*, COLUM. JOURNALISM REV., July/Aug. 1988, at 21, 22.

- Jody Powell, President Carter's press secretary, leaked information to a *Chicago Sun Times* reporter that Senator Charles Percy had accepted questionable favors from the Bell and Howell Company. At the time, Percy had been sharply critical of Bert Lance, the President's budget director and adviser, and Powell provided the information on the understanding that its source would not be identified. After investigating the story and finding it to be entirely false, the reporter ran an article stating that top White House aides were trying to smear a Senator because of his involvement in the Lance probe. Smyser, *There Are Sources and Then There Are "Sourcerers"*, 5 SOC. RESP.: JOURNALISM, L., MED. 13, 17-18 (1979).
- A *Philadelphia Inquirer* editorial writer talked to a University of Pennsylvania student about the attempted assassination of President Reagan in 1981. The discussion was "off the record," *i.e.*, on the condition that it not be published, and the student stated that he thought " 'President Reagan should be killed.' " The writer recounted the conversation in his article despite the off-the-record agreement, explaining that he violated "this man's trust" because "I owe more allegiance to the president and the country than to people who hide behind the very freedoms we value, in order to express ideas that threaten us all." Goodwin, *supra*, at 125.[22]

[22] In addition, Joan Konner, the Dean of the Graduate School of Journalism at Columbia University, has written that "[a]t the risk of offending some journalism fundamentalists, I'd like to question one of the pieties and absolutes of the trade: the inviolability of sources. * * * The question * * * is more ethical than legal, and sometimes principles come into conflict and we break our promises and our confidences to serve what we deem to be a more important purpose." NEWSDAY, Dec. 11, 1989, at 47. Similarly, the code of the Radio-Television News Directors Association recognizes "the journalist's ethic of protection of confidential information and sources" and urges the "unswerving observation of it *except in instances in which it would clearly and unmistakably defy the public interest.*" Goodwin, *supra*, at 373 (emphasis added). And in a recent American Society of Newspaper Executives survey of

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These illustrations provide a compelling demonstration of what common sense teaches in any event: a reporter's promise is not absolute. Petitioner's one-dimensional approach—which focuses exclusively on the existence of the promise and excludes all consideration of the *public* interest—simply cannot stand.

This is not to suggest, of course, that promises to sources should ever be lightly overridden. But there is no realistic danger of that happening, as is evident from the fact that promises have been breached only in the rarest and most compelling circumstances. Journalists recognize and take with utmost seriousness their obligation to honor promises. What is more, journalists have a critical interest in the continued availability of confidential sources, which could be jeopardized if promises routinely are broken and prospective sources come to doubt the integrity and good faith of the press. See, *e.g.*, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1564-1565, 1569 (1989). For those reasons, the risk of breach is an inherently self-limiting problem that will seldom arise in practice.

Seizing on the First Amendment interest in confidential sources, petitioner argues (Br. 7-10, 27-29) that constitutional values would be disserved rather than furthered by allowing publication of truthful and newsworthy information in violation of a promise of confidentiality. As just discussed, that conclusion does not follow from the premise. But more to the point, the required balancing of competing journalistic interests should be the responsibility

[22] *continued*
journalistic ethics, publishers, editors, and staff members broadly agreed that a pledge of confidentiality "should always be taken seriously" but "can be violated in unusual circumstances." P. Meyer, ETHICAL JOURNALISM 209 (1987).

of journalists, not private plaintiffs and the courts. Journalists have both the incentive and expertise required to assure a free flow of information, and, as a practical matter, ethical standards governing their relationship with sources "cannot be legislated." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974). In the end, it is

> more important that the government be kept out of the business of penalizing the publication of news, including a source's identity, than that confidential sources be compensated for damages suffered as the result of a reporter's broken promise.

Langley & Levine, *Broken Promises*, COLUM. JOURNALISM REV., July/Aug. 1988, at 21, 24.

As the record reflects, this case has been the subject of "considerable debate in the journalistic community," and knowledgeable and thoughtful observers "have come down on all sides of the issue." Tr. 499. Whatever the final results of the journalistic debate, the very existence of such a debatable issue proves the wisdom of the Minnesota Supreme Court's decision to treat this case as an ethical rather than a legal matter.[23] By holding that the promises of confidentiality were not legally enforceable in this case, the court below reached a wise resolution of a difficult issue, and nothing in its conclusion conflicts with the First Amendment.

[23] See D. Gillmor, J. Barron, T. Simon, & H. Terry, MASS COMMUNICATION LAW 394 (5th ed. 1990) ("[g]enerally, a broken promise by a reporter raises an ethical question but provides no legal cause of action"; the now-reversed decision of the Minnesota Court of Appeals in this case "alone suggests otherwise"); Langley & Levine, *supra*, COLUM. JOURNALISM REV. at 24 ("[e]thical, not legal, considerations should determine whether a journalist, once having promised confidentiality, should go back on his word").

C. A State-Court Damages Award To Enforce A State-Created Legal Obligation Constitutes State Action

In a further effort to evade the policies of the First Amendment, petitioner contends (Br. 14-17) that the First Amendment is simply irrelevant here because there is no "state action." In his view, the Minnesota Supreme Court's opinion "disregarded the difference between governmental coercion and private voluntary conduct." *Id.* at 15.

We note first that this issue was not properly raised in the petition for certiorari. The Question Presented concerned the substantive content rather than the applicability of the First Amendment, and not a word in the petition refers to the issue of state action. Having failed to include it in his petition, petitioner cannot now interject this issue in his brief on the merits.[24]

In any event, by framing his argument in terms of "contract law" (Br. 15, 16), petitioner once again misstates the question presented. The question here is not, as petitioner would have it, whether state action arises when a court is asked to enforce a legal obligation voluntarily undertaken by private parties.[25] Because the Minnesota Supreme Court held that there was no contract under state law, the only possible basis for the newspapers' potential liability is promissory estoppel. That doctrine, however, does not involve a voluntarily assumed legal duty but rather creates an obligation "implie[d] * * * in law where none exists in fact." Pet. App. A10.

[24] Moreover, as explained above (see page 23, *supra*), the Minnesota Supreme Court did not address the state action issue.

[25] Even in that situation, judicial enforcement of a private contract is sufficient to constitute state action. See *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 232 n.4 (1956) ("[o]nce courts enforce the agreement the sanction of government is, of course, put behind them"); *Barrows* v. *Jackson*, 346 U.S. 249, 254 (1953); *Shelley* v. *Kraemer*, 334 U.S. 1, 18, 20 (1948).

In this case, therefore, the role of state law is two-fold. First, it establishes a legal rule that implies an obligation that was not voluntarily formed or accepted between the parties. Second, it provides a judicial mechanism for enforcing that legally created obligation, thereby backing the duty with the coercive authority of government.

Once the state action issue is correctly formulated, this case becomes indistinguishable from *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). There, the Court held that judicial enforcement of a cause of action for defamation constitutes state action. The Alabama Supreme Court had reasoned, as petitioner argues here, that "[t]he Fourteenth Amendment is directed against State action and not private action." *Id.* at 265. The Court rejected that reasoning in language that is equally applicable to the present case:

> That proposition has no application to this case. Although this is a civil lawsuit between private parties, the *Alabama courts have applied a state rule of law* which [defendants] claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only * * *. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Ibid. (emphasis added). This Court consistently has adhered to the state action holding of *New York Times*. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982) (emphasis added) ("[a]lthough this is a civil lawsuit between private parties, *the application of state rules of law by the Mississippi state courts* in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment"); *Philadelphia Newspapers*, 475 U.S. at 777.

This settled principle is controlling here. As in *New York Times*, state law in this case provides both the governing rule of law and the legal enforcement mechanism. This is ample state action to bring the First Amendment into play. See *Ruzicka* v. *Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1295 (D. Minn. 1990); *Virelli* v. *Goodson-Todman Enterprises*, 536 N.Y.S.2d 571, 576 (App. Div. 1989), subsequent opinion, 558 N.Y.S.2d 314 (1990).

Petitioner's only response is that the law of contracts in this case, unlike the law of defamation in *New York Times*, rests on a voluntary agreement between the parties and is neutral with respect to First Amendment values because it is not designed to curtail speech. These objections are insubstantial. As the Minnesota Supreme Court held, no contract existed here, and the newspapers no more voluntarily agreed to pay money to petitioner if they published an article disclosing his name than the *New York Times* voluntarily assumed an obligation to pay Sullivan if it published statements unflattering to him. In both cases, the plaintiff is asking a court to require the newspaper to compensate him for violation of a legal duty created by operation of state law, not one voluntarily assumed by the parties.

Moreover, the asserted neutrality of contract law to First Amendment rights is irrelevant. While most such disputes will not raise any First Amendment issue, state law can be unconstitutional as applied in a given case, and promissory estoppel law is not exempt from constitutional scrutiny where, as here, it would impinge on freedom of the press. Petitioner's argument is just as applicable to the cause of action for malicious interference in *Claiborne Hardware* or the claim for intentional infliction of emotional distress in *Falwell*. While those actions normally do not implicate the First Amendment, they are subject to constitutional review when they do, and the same is true of the promissory estoppel theory in this case.

D. The Reporters' Promises Of Confidentiality Did Not Waive The First Amendment Rights Of The Newspapers And The Public

Petitioner also asserts (Br. 20-22) that, even if the First Amendment applies in this case and would otherwise be violated, the reporters' promises of confidentiality waived the newspapers' First Amendment rights.[26] This assertion of waiver is unfounded.[27]

Petitioner's claim simply begs the question before the Court. The First Amendment question in this case is whether the newspapers have a First Amendment right to publish petitioner's name *notwithstanding* the reporters' promises of confidentiality. The existence of the promise thus is an essential part of the question presented but does not provide the answer; it states rather than resolves the issue. Accordingly, the reporters' promises of anonymity are not and cannot be a waiver of the First Amendment right claimed by the newspapers to publish petitioner's name despite the reporters' promises.

In addition, petitioner's argument does not meet the strict standard applicable to a purported waiver of constitutional rights. Two overarching considerations inform the proper analysis of the waiver issue here. First, the asserted waiver involves not just the newspapers' right to publish but also the public's (and in this case the voters') right to know. This latter right is itself entitled to constitutional protection. See, *e.g.*, *Eu*, 489 U.S. at 223; *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395-396 (1981); *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S.

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[26] The waiver issue was not considered by the Minnesota Supreme Court. See page 23 note 6, *supra*.

[27] The issue of the waiver of federal constitutional rights is itself a question of federal constitutional law. See, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 397 n.4 (1977); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966).

748, 756-757 & n.15 (1976). Given the trilateral interests involved, the Court should be hesitant to find that a bilateral reporter-source promise waives the public's right to receive truthful political information.

Furthermore, a reporter cannot exercise or relinquish a newspaper's First Amendment rights alone; rather, reporters share that responsibility with the publisher, editors, and other reporters. The collaborative editorial process is an integral feature of journalism and is essential to the press's performance of its role. While we do not ask this Court to hold that a reporter cannot bind the paper under state promissory estoppel law,[28] consideration of the effective functioning of the editorial process protected by the First Amendment requires caution in allowing individual reporters to forfeit the free press rights of the entire organization.

In fact, in October 1982, the Pioneer Press Dispatch had in place a written policy directing reporters not to grant confidentiality to a source without first checking with an editor. Tr. 662, 1425-1427.[29] At trial, David Hall explained that one of the reasons he decided to disclose petitioner's identity was the reporter's failure to obtain approval before promising confidentiality. Tr. 1440. Moreover, apart from any requirement of prior approval, it generally is recognized that the final decision whether to identify a confidential source rests with the editor rather than the

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[28] But see *Froelich* v. *Aspenal, Inc.*, 369 N.W.2d 37, 39 (Minn. Ct. App. 1985) ("[promissory e]stoppel cannot be posited on the claimed actions of an agent"). Because the Minnesota Supreme Court raised the promissory estoppel issue *sua sponte* in its opinion, respondents did not have an opportunity to be heard on the agency question.

[29] Other newspapers have adopted similar policies. See Langley & Levine, *supra*, COLUM. JOURNALISM REV. at 22; Goodwin, *supra*, at 132 (*Detroit Free Press* policy); Washington Post, June 13, 1988, at A4, col. 2 (*Newsday* policy).

reporter. Tr. 652, 656, 1140, 1394-1395, 1490, 1493; D. Gillmor, J. Barron, T. Simon, & H. Terry, MASS COMMUNICATION LAW 361 (5th ed. 1990) ("[a]pproval of and review by editors of reporters' use of confidential sources has since become routine").[30]

Especially against this background, the requirements for waiver of a constitutional right must be exacting, as this Court has recognized. In civil as in criminal cases, the Court has applied a constitutional standard that requires a waiver to be "voluntary, knowing, and intelligently made" and represent " 'an intentional relinquishment or abandonment of a known right or privilege' " with "full awareness of the legal consequences." *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185-187 (1972) (citation omitted). "In the civil area, the Court has said that '[w]e do not presume acquiescence in the loss of fundamental rights' " but instead must " 'indulge every reasonable presumption against waiver.' " *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (citations omitted). And, witn particular regard to the First Amendment, the Court has been "unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 145 (1967). See *Ruzicka*, 733 F. Supp. at 1296-1298.

Applying these principles, it is clear that the reporters' promises—which did not even constitute a binding contract—did not waive the newspapers' First Amendment rights. At the time of their dealings with petitioner, the reporters lacked sufficient information to make a knowing and intelligent waiver. Although they were aware of

[30] See also *Poteet* v. *Roswell Daily Record, Inc.*, 584 P.2d 1310, 1312-1313 (N.M. Ct. App. 1978) (A reporter's promise of confidentiality "was insufficient to show waiver without raising the additional requirement of the reporter's authority to speak for the defendant. * * * Absent authority, the statements of the reporter could not be considered as a waiver of a constitutional privilege by the defendant newspaper").

petitioner's background and political history, they did not know, for example, that he was approaching them in his capacity as a Whitney Campaign adviser. Nor did they know the nature of the information he was offering to provide in exchange for their pledge of confidentiality, including specifically the public availability of the criminal records he possessed and the obsolete and minor character of the charges involved. Nor, for that matter, did they know that petitioner's overtures were part of a broader scheme by members of the Whitney Campaign to discredit the DFL ticket. Given the purpose of the leak, petitioner deliberately kept the reporters in the dark and failed to reveal information that would be material to an informed and conscientious waiver decision.

It also is significant that the editors decided to publish petitioner's name "in the larger context of the news" (Pet. App. A9) on the basis of additional information that was not known to the reporters. In particular, petitioner's identity had been confirmed through independent sources, and the Whitney Campaign was publicly denying any involvement in the attack on Johnson. Even if the reporters' promises amounted to a waiver in the circumstances in which they were made, they should not bind the newspapers from later setting the public record straight based on information gathered apart from petitioner's original discussions.

CONCLUSION

The writ of certiorari should be dismissed. In the alternative, the judgment of the Supreme Court of Minnesota should be affirmed.

Respectfully submitted.

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FEBRUARY 1991